Supreme Court, U.S.
JAN 19 2011
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No. 10-946

In The
Supreme Court of the United States

ROBERT BIERENBAUM,
Petitioner,

v.

MARK BRADT,
Superintendent of Attica Correctional Facility,
et al.,
Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

NATHAN Z. DERSHOWITZ
(Counsel of Record)
VICTORIA B EIGER
Dershowitz, Eiger & Adelson, P C.
220 Fifth Avenue, Suite 300
New York, NY 10001
(212) 889-4009

Attorneys for Petitioner

QUESTIONS PRESENTED

I. In the aftermath of *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny, do there remain constitutional limitations on the prosecution's use of unreliable out of court statements of non-testifying declarants in criminal trials, and is Petitioner entitled to habeas corpus relief because his conviction was obtained in violation of those limits?

II. What is the proper mode of analysis for the evaluation of trial prejudice in failure to investigate cases?

A. In evaluating prejudice, does the court look at the trial that took place, or the trial that would or could have taken place had counsel performed competently?

B. In evaluating an ineffective assistance claim, does the court look at each act or omission in evaluating prejudice, or must it look at a bigger picture?

C. In assessing prejudice, to what extent may or must the court consider witness credibility, and the weight to be given or the inferences to be drawn from the testimony?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court whose judgment is sought to be reviewed were respondents Harold C. Graham, Superintendent of Auburn Correctional Facility, and Eliot Spitzer, Attorney General of the State of New York. The present caption reflects that Petitioner was moved to a different facility, and that New York State has elected a new Attorney General, Eric C. Schneiderman.

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OPINIONS BELOW

The Supreme Court of the State of New York, Appellate Division, First Department affirmed the judgment of conviction of the Supreme Court, New York County, in an Opinion reported at *People v. Bierenbaum*, 301 A.D.2d 119, 748 N.Y.S.2d 563 (1st Dept. 2002), set forth at App. 1. The Order of the New York State Supreme Court denying Petitioner's §440 motion for post-conviction relief, dated September 6, 2005, is reported at *People v. Bierenbaum*, 2005 WL 5643796 (N.Y. Sup. Ct. 2005), and is set forth at App. 50. The order of the United States District Court for the Southern District of New York denying Petitioner's §2254 habeas petition, entered on February 25, 2008, is reported at *People v. Bierenbaum*, 2008 WL 515035 (S.D.N.Y. 2008), and is set forth at App. 98. The Opinion of the United States Court of Appeals for the Second Circuit affirming the denial of habeas relief is reported at *Bierenbaum v. Graham*, 607 F.3d 36 (2d Cir. 2010), and is set forth at App. 164. The unreported Order denying a petition for rehearing and rehearing en banc was entered on August 23, 2010, is set forth at App. 210.

JURISDICTION

The Court of Appeals filed its opinion on May 25, 2010. (App. 164) It denied rehearing and rehearing en banc on August 23, 2010.

Justice Ginsburg granted an extension of time to file a Petition for Writ of Certiorari to January 20, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

[N]or shall any State ... deprive any person of life, liberty, or property, without due process of law ...

The Sixth Amendment to the United States Constitution provides, in pertinent part:

In all criminal proceedings, the accused shall ... have the assistance of counsel for his defence.

28 U.S.C. §2254 provides, in pertinent part:

(D) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENTS OF FACTS

An indictment returned in 1999 charged Petitioner Dr. Robert Bierenbaum ("Petitioner") with murdering his wife of three years, Gail Katz Bierenbaum (hereinafter "Katz"). Katz had not been seen after July 7, 1985. Her death was presumed. No body was ever found, and there were neither witnesses to, nor forensic evidence of, any homicidal act.

The People's theory was that, on July 7, 1985, Bierenbaum killed Katz in their Upper East Side apartment, that he transported her body to an airport in New Jersey, rented a small plane, and dumped the body from the plane into the ocean. The People theorized that Bierenbaum strangled Katz, since he allegedly had choked her unconscious 20 months earlier; that he may have cut up her body in the apartment, since he was a surgeon; and that, in the middle of the day, he carried her 110 pound body out of the high-rise building and into his car without attracting the attention of the doorman or anyone else. Nor did anyone see Bierenbaum load anything onto the airplane. Thus, the prosecution theory was a "theory" in its technical sense: a set of assumptions devised to explain a phenomenon, the disappearance of Katz.

When the case reached the Second Circuit on habeas corpus, Second Circuit Judge Calabrese said the case "troubled" him and called the evidence "very thin." (App. 208)

At trial, a medical examiner testified that it was possible for a surgeon to cut up a body in ten

minutes. A police department pilot testified – and a videotape demonstrated – that it was possible for a solo flyer to load, with some difficulty, a package weighing 110 pounds into a plane and dump it without losing control.

Detectives testified that, in accounting for the events of July 7, 1985, Bierenbam omitted mention of his plane rental and his flight that afternoon.[1] A succession of women who Bierenbaum dated in the decade following Katz's disappearance testified that he offered varying theories of Katz's disappearance or demise.

Many witnesses testified to conversations they had with Katz in which she spoke about her marriage and her husband. Witnesses testified that Katz said she was unhappy, scared, and ready to leave. Prosecution witness Maryanne DeCesare testified over objection that Katz told her that Bierenbaum said he would kill her if she left him. Also admitted through DeCesare was Katz's statement that Bierenbaum told Katz that, unlike Claus Von Bulow, he would not leave evidence. (T. 2222-23)

Katz's therapists testified about conversations they had with Katz between 1983 and 1985 in which she talked about the state of her marriage, her fear of Bierenbaum's temper, his erratic behavior, his threats, and an incident in 1983 when Katz told them

[1] Nevertheless, during the initial investigation, the investigators learned that Petitioner had that day rented a plane. Forensic examination of the aircraft, and of the automobile Bierenbaum was using, yielded no results.

Bierenbaum had choked her until she became unconscious.

In addition, three prosecution witnesses testified that Katz told them she had a letter from Bierenbaum's psychiatrist warning her of his future potential for violence toward her. (T. 2140-41, 2388-92, 2441-42)

Katz's hearsay statements were admitted under a hodge-podge of nebulous theories of admissibility – "state of the marriage", "state of mind," "future intent," "identity," as a "Molineux concept,"[2] and as proof of Bierenbaum's motive or intent – over evidentiary and Constitutional objections that those hearsay statements were inadmissible, unreliable, and highly prejudicial. (*E.g.*, T. 2206-07)

Bierenbaum, who has always maintained his innocence, put the State to its proof. As Bierenbaum had stated many times, he contended that he and Katz had argued on July 7, after which she walked out of the apartment, headed for Central Park. He did not know what happened after she left, but thought she may have fallen victim to foul play. Yet, advancing the prosecution's case against him, in his *opening statement,* Petitioner's counsel *conceded* that Katz died on July 7, 1985, a fact at the very heart of the *prosecution's* case and an essential element of the

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[2] *People v. Molineux,* 188 N.Y. 264 (1901), is the seminal New York case which sets forth the purposes for which a defendant's criminal and other bad acts may be admissible, such as to prove motive, intent, or absence of mistake or accident.

murder offense charged. (T. 1881, 1885, 3117-18, 3166)

In support of his position that Katz left the apartment alive as Bierenbaum maintained, the defense called Joel Davis, who had called Missing Persons upon seeing a poster with Katz's photo, and who had been interviewed by the police about his sighting. Davis testified that he had seen Katz – the woman on the Missing Persons poster – in the afternoon on the day of her disappearance, in a bagel shop near where Davis worked.

There were other witnesses who would have corroborated Davis's testimony, two witnesses who had heard or seen Katz leave the couple's apartment, but *their testimony was never presented to the jury.*

Six months before opening statements, pursuant to its *Brady* obligations, the prosecution advised defense counsel that June Sherman, who lived in the apartment directly below the Bierenbaums, had provided exculpatory information to an investigator on April 30, 1998. According to the report:

> On the day of Gail's disappearance, which was a Sunday morning, Mrs. Sherman heard Gail screaming and Robert yelling. She did not know what they were saying. Mrs. Sherman heard a loud bang and then, it was absolutely quiet after that. Mrs. Sherman assumed that the bang was the front door, but it could have been an inner door. All of the doors in the apartment are heavy.

(D.C. Dkt. 1, Ex. B:G)

In fact, the information Sherman had was even more powerful than the disclosed report indicated: in an affidavit she provided in connection with post-conviction proceedings, she maintained that she heard Katz's high heels on the floor above her, and had then heard *the door of the apartment close.* Based on Sherman's "familiarity with Katz's footsteps and voice," Sherman "believe[d] Katz left the apartment when the door slammed." (*See* App. 212)

Though the *Brady* material included Sherman's current address and telephone number – she had moved to Arizona before Bierenbaum's trial began – *defense counsel never sought to interview Sherman before trial.* Nor, prior to trial, had defense counsel subpoenaed Sherman, contacted her to ascertain her availability, or advised her she would be called to testify.

Only after the jury was selected and trial was underway did defense counsel take the first step to seek Sherman's attendance. Affirming that her testimony was necessary and material, counsel applied for and received a court order calling for her attendance as a witness at trial. One single attempt was made to serve Sherman and it was unsuccessful. Thus, the trial concluded without defense counsel having spoken to Sherman, and without the jury having heard what she heard from the apartment above her on the day Katz disappeared.

Before trial, the defense did interview Pablo Alvarez, a 33 year employee in the building in which

Katz and Bierenbaum lived. In a sworn statement Alvarez gave after the trial, Alvarez stated that on the summer Sunday in 1985 when Katz disappeared, having relieved the doorman, he saw Katz exit the building. He had given this information to investigators or lawyers for the defense. Though available to testify at Bierenbaum's trial, Alvarez was not called to testify.

On direct appeal, Petitioner challenged the sufficiency of the evidence and the admission of the statements purportedly made by Katz. He argued, among other things, that her out of court statements were not reliable and that their admission violated his rights under the Confrontation Clause. (*See* Def. App. Div. Brf. at 75-78)

The Appellate Division, First Department, affirmed, holding the evidence to be legally sufficient.

> That the victim died July 7, 1985 is *conceded*. That defendant was the last person *who saw her*, and who was known to have been alone with her until 11:00 A.M., cannot be persuasively disputed *on the basis of this record*.

(App. 2-3, emphasis added)

The Appellate Division also rejected defendant's challenge to the admission of Katz's hearsay statements, holding that, with one exception that constituted harmless error, there was no error admitting them. It ruled that "the reliability of this evidence, initially a question for the [trial] court to resolve, is amply supported by the record." (App. 37)

It noted that the statements were "spontaneous"; were "repeated" to various people; were a "natural consequence of corroborated facts about their marriage"; that Katz was "in good mental health"; that there was "no reason for her to have fabricated the matters"; that the statements concerned "private matters" one would be embarrassed or reluctant to disclose to others; and that there was no coercion or questioning by anyone, and no attempt by her to curry favor. (App. 37)

After the New York Court of Appeals denied leave to appeal, and this Court denied certiorari, Petitioner sought state post-conviction relief, contending, *inter alia*, that his trial counsel was constitutionally ineffective. Among other things, Petitioner claimed counsel was deficient in conceding in his opening statement that Katz died on July 7, 1985, failing to interview June Sherman before trial, and failing to present Sherman and Pablo Alvarez as trial witnesses.

In post-trial affirmations, neither of Bierenbaum's attorneys offered a tactical or strategic reason for having failed to interview Sherman before trial. In fact, in their application to the court for an order requiring her attendance at trial, defense counsel had represented that Sherman's testimony was both material and *necessary* to the defense.

The attorney who handled the trial stated that, had he known that Sherman would have testified consistent with the affidavit she executed post-trial, he would have called both her and Alvarez to the stand. Petitioner's other attorney attested that, if Sherman's testimony existed, he would have urged

that Pablo Alvarez be called as a defense witness, too. (D.C. Dkt. 1, Ex. B:M ¶4)

Purporting to explain his *concession* that Katz died on July 7, 1985, defendant's trial attorney contended he made a strategic decision "because I believed that this would prevent the People from eliciting testimony from her family and friends in the nature of the impact of the victim's death on her family and friends." (D.C. Dkt. 1, Ex. B:M ¶12)

The Supreme Court, New York County, Trial Term, denied Bierenbaum's application for post-conviction relief, without a hearing. (App. 50) Citing *Strickland v. Washington,* 466 U.S. 668 (1984), but purporting to analyze the case under the "higher" and "more flexible" state standard, Judge Ruth Pickholz concluded "that the defendant was afforded meaningful representation under the New York State Constitution." (App. 55)

Judge Pickholz did not analyze the claim with reference to the two-pronged *Strickland* standard, nor did she explicitly address defendant's failure to investigate claim, that is, his claim that counsel should have interviewed June Sherman before trial and before deciding on defense witnesses and trial strategy.

Judge Pickholz stated:

> Although it would have been prudent to speak with Ms. Sherman at an earlier date, the defense made diligent efforts to secure her attendance as soon as the trial actually began. The People's case

> lasted more than two weeks, and it would have been reasonable to believe that she would be available in time to be interviewed and, if she proved to be a friendly witness, testify. That the efforts of defense counsel proved unavailing is not an indication of ineffectiveness. *People v. Donovan* (184 AD2d 654), upon which defendant relies for the contrary proposition, is inapposite. (App. 70)

She continued:

> Moreover, their decision not to rush to interview her can be explained by the fact that they already knew what she had told the prosecution's investigator, and considered her an unfriendly witness. (footnote omitted). (App. 70)

Their basis for that assumption, counsel stated in an affidavit, was that Ms. Sherman did not reach out to contact *them*. (App. 71, n.10)

Addressing the effect of the failure to present Sherman's testimony, she said:

> Whether or not their assessment of her hostility was correct, had she testified, it is as likely that her testimony would have hurt the defense as aided it. Not only was her account of the click of heels

> followed by the slam of a door completely inconsistent with defendant's statements to the police that his wife was wearing sandals when she left the apartment, but she told investigators that she only believed that it was the front door that she heard slam and that it could have been any door. If the jury believed that she had heard the sounds of "Gail screaming and Robert yelling," followed by the slam of an interior door and sudden silence, it would have undermined the scenario suggested by the defense and strengthened the prosecution's theory that the defendant had killed her in the apartment. At the very least her report of the Bierenbaum's incessant cat-and-dog fights and her account of the screams and yelling she heard that morning would have been harmful to the defense. (App. 71)

Judge Pickholz added:

> I also note that Ms. Sherman's inability to provide investigators with *any* relevant information about the day of the disappearance immediately after the event but ever-improving recall of detail as the years have [sic] would also have presented problems for the defense. Had she testified it would have been especially difficult for Mr. Lewis to employ the argument he made in summation that it was dangerous to rely

> upon recent memories of ancient events. (App. 71)

She concluded:

> Trial counsel were therefore not ineffective for failing to obtain her testimony. (*See People v. Llanos*, 13 AD3d 76; *People v. Brooks*, 283 AD2d 367). (App. 71)

Judge Pickholz also ruled that trial counsel "made a strategic decision" not to call Pablo Alvarez "in the absence of credible evidence buttressing" his contention that he saw Katz leave the building. (App. 71) She noted, but did not address, trial counsels' sworn statements that that they *would have called* Alvarez if they had gotten Sherman's testimony. (App. 71)

The judge called the concession that Katz died on July 7 "questionable," and stated, "Although concessions that are based upon a valid trial strategy cannot form the basis for a determination that an attorney was ineffective..., the logic underlying trial counsel's explanation for this concession is somewhat tenuous." (App. 74-75) But, suggesting that the concession did not prejudice the Petitioner, she wrote, "the circumstances surrounding the disappearance of Ms. Katz as well as other evidence in the case nevertheless compel the conclusion that she indeed died on July 7." (App. 75)

The New York Court of Appeals denied leave to appeal Justice Pickholz's decision. *People v. Bierenbaum*, 6 N.Y.3d 892, 850 N.E.2d 674 (2006).

Petitioner timely sought relief under 28 U.S.C. § 2254 in the United States District Court for the Southern District of New York, claiming that he was denied his Sixth Amendment right to effective assistance of counsel and that the admission of hearsay statements violated his rights to confront the witnesses under the Sixth Amendment's Confrontation Clause.

The district court denied habeas corpus relief, without a hearing. (App. 98) Without addressing defendant's failure to investigate claim, the district court ruled that counsel's performance was neither deficient nor prejudicial. (App. 138-53) The district court further ruled that Katz's out of court statements were not "testimonial" and that their admission therefore did not implicate the Confrontational Clause. (App. 154)

After granting a certificate of appealability, the Second Circuit affirmed the denial of habeas relief. (App. 164)

It held that Petitioner's Confrontation claim had to be evaluated under *Ohio v. Roberts*, 448 U.S. 56 (1980), which set forth the clearly established rule when Petitioner's claim was adjudicated on the merits, and when his conviction became final. (App. 185-86) Under *Roberts*, the statements of an unavailable hearsay declarant were "admissible only if [they bore] adequate 'indicia of reliability,'" a standard that could be satisfied by demonstrating that the evidence fell "within a firmly rooted hearsay exception," or that the evidence had "particularized guarantees of trustworthiness." 448 U.S. at 66.

The Court of Appeals ruled that Katz's statements were admissible because there were adequate indicia of reliability. The Court quoted the state court's decision, and concluded that, "It was not unreasonable for the Appellate Division to conclude that the reliability of Katz's statements was "amply supported." (App. 188)

The Court of Appeals affirmed the denial of relief on Petitioner's ineffective assistance claims, likewise failing to address the failure to investigate claim. Treating the failure to *interview* Sherman solely as a failure to *call* the witness, the Second Circuit ruled that Petitioner had not shown prejudice:

> Sherman's testimony would not have undermined confidence in the jury's guilty verdict. Sherman would have testified that she believed Katz left the apartment after the door slammed. She would have had to admit that she did not see Katz leave, nor could she be sure that the door was the exterior door, rather than an interior door. The prosecution would have argued that even if the jury believed Sherman was testifying truthfully about what she heard, her testimony was consistent with the prosecution's theory that Bierenbaum killed his wife in the course of an explosive argument. (App. 197)

Petitioner's motion for rehearing and rehearing en banc was denied by the Court of Appeals for the Second Circuit on August 23, 2010. (App. 210)

By order dated October 20, 2010, Justice Ginsburg extended Petitioner's time to file his petition for certiorari to January 20, 2011.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THERE REMAIN CONSTITUTIONAL LIMITATIONS ON THE USE OF NON-TESTIMONIAL STATEMENTS OF NON-TESTIFYING DECLARANTS IN CRIMINAL TRIALS AND WHETHER PETITIONER'S CONVICTION WAS OBTAINED IN VIOLATION OF THOSE LIMITS

This case presents two highly cert-worthy questions that arise in the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), and its progeny. First, do there remain constitutional limitations on the use, against criminal defendants, of non-testimonial hearsay statements of non-testifying declarants. Second, is this Petitioner entitled to habeas corpus relief because his state conviction was obtained in violation of those constraints.

A. The Due Process Clause of the Fourteenth Amendment Proscribes the Use, Against a Criminal Defendant, of Unreliable Out-of-Court Statements by Declarants Who Are Not Subject to Cross-Examination.

Out of court statements are, with certain exceptions, presumptively unreliable. See *Bourjaily v. United States,* 483 U.S. 171, 179 (1987); *Idaho v. Wright,* 497 U.S. 805, 816-17 (1990); *Lee v. Illinois,* 476 U.S. 530, 543 (1986). The Court's jurisprudence also establishes that, in a variety of contexts, the Due Process Clause is violated when the adjudication of important rights rests on unreliable evidence or evidence the reliability of which cannot be adequately tested.

In the decades before *Crawford,* the constitutional implications of the use of "presumptively unreliable" hearsay against a criminal defendant were analyzed, almost exclusively, under the Confrontation, rather than the Due Process, Clause. *Ohio v. Roberts,* 448 U.S. 56, 66 (1980), held that the Confrontation Clause is not violated by the admission of out-of-court statements if they bear adequate "indicia of reliability," even if the declarant is not available to testify in court.

Subsequent re-interpretation of the Confrontation Clause, based upon analysis of the historical record, has re-drawn the Confrontation Clause's scope and protections. *Crawford v. Washington,* 541 U.S. 36 (2004), *overruling Ohio v. Roberts,* and *Crawford's* progeny, *Davis v. Washington,* 547 U.S. 813 (2006), and *Whorton v. Bockting,* 549 U.S. 406 (2007), establish that the *Confrontation Clause* imposes no limitations whatsoever on the use of non-testimonial hearsay.

The absence of rights under the Confrontation Clause does not mean that there are no Constitutional

limitations on the use of non-testimonial hearsay. In a variety of situations, including situations in which a defendant has no Confrontation Clause rights, he nevertheless enjoys rights under the Due Process Clause, including the right not to be convicted upon evidence that is unreliable.[3] Cross-examination, which tests the reliability of evidence by "rigorous testing," *Maryland v. Craig*, 497 U.S. 836, 845 (1990), is not available where, as here, the declarant did not testify.

Individually and collectively, this Court's precedents establish a substantive reliability threshold, premised on due process, for the admission of inculpatory evidence, for determining the fairness and the adequacy of the proof in a criminal trial, and for evidentiary admissibility and sufficiency determinations in quasi-criminal and other proceedings in which the Confrontation Clause does not apply but in which important rights are adjudicated.

Due process requires that evidence admitted against a defendant carry some minimum indicia of reliability. *See Manson v. Brathwaite*, 432 U.S. 98, 114 (1977); *Moore v. Illinois*, 434 U.S. 220, 227 (1977); *Neil v. Biggers*, 409 U.S. 188, 198 (1972); *Cf.*, *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948). *See also California v. Green*, 399 U.S. 149, 164 n.15 (1970)

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[3] *But see* Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and "At Risk,"* 14 Widener L.Rev. 427 (2009) ("the successive decisions of [*Crawford*, *Davis*, and *Whorton*] raise the specter of there being no constitutional restrictions on state evidentiary rules that admit 'non-testimonial' hearsay evidence.").

("[W]e may agree that considerations of due process, *wholly apart from the Confrontation Clause*, might prevent convictions where a reliable evidentiary basis is totally lacking" (emphasis added); *id.* at 187 n.20 (Harlan, J., concurring)). *Compare West v. Louisiana*, 194 U.S. 258 (1904)(prior recorded testimony under oath and subject to cross-examination is sufficiently reliable to satisfy standards of due process), *overruled on other grounds, Pointer v. Texas,* 380 U.S. 400 (1965), *with United States v. Shoupe*, 548 F.2d 636, 643-44 (6th Cir. 1977) (disavowed, unsworn, and uncorroborated hearsay statement is insufficiently reliable to satisfy due process).

Thus, unreliable eyewitness testimony is inadmissible in a criminal prosecution. *See Manson; Biggers; Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967). Similarly, one reason for the exclusion of coerced confessions is the recognition that such confessions are unreliable. *Stein v. New York*, 346 U.S. 156, 182 (1952) ("The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt."), *overruled on other grounds, Jackson v. Denno,* 378 U.S. 368 (1964).

In proceedings other than criminal trials, where the Confrontation Clause has no application but where important interests are at stake, due process prohibits decision-making based on unreliable evidence. Thus, while the Confrontation Clause does

not apply to sentencing proceedings, a baseline of reliability still applies in determining evidentiary admissibility. *See Specht v. Patterson*, 386 U.S. 605 (1967); *Gardner v. Florida*, 430 U.S. 349 (1977). *See also United States v. Reme*, 738 F.2d 1156, 1167 (11th Cir. 1984), *cert. denied*, 471 U.S. 1104 (1985) (collecting cases and affirming use of "out of court information" at sentencing "so long as the defendant is afforded an opportunity to refute it, *and it is reliable.*") (Emphasis supplied).

Due process rights to ensure evidentiary reliability have also been found to apply in parole revocation proceedings that are held long after a criminal prosecution has concluded, and thus beyond the reach of the Confrontation Clause. *Morrissey v. Brewer*, 408 U.S. 471 (1972), requires a threshold of evidentiary testing to minimize the risk of erroneous adjudication results in parole revocation proceedings.

The same concerns have led to the recognition of due process limitations on the evidence admitted in deportation proceedings, a completely non-criminal process, and beyond the Confrontation Clause's reach. *See Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945)(criticizing the substantive use of inconsistent statements as substantive proof because '[s]o to hold would allow men to be convicted on unsworn testimony of witnesses, a practice which runs counter to the notions of fairness on which our legal system is founded."); *Alexandrov v. Gonzales*, 442 F.3d 395 (6th Cir. 2006); *Anim v. Mukasey*, 535 F.3d 27, 31 (4th Cir. 2004). *See also Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (setting a gate-keeping function for trial judges to ensure that

evidence lacking in fundamental reliability is excluded, even in civil proceedings).

Thus, this Court should grant certiorari in this case and eliminate the uncertainty engendered by the *Crawford, Davis, Bockting* line of cases. *See* n. 3, *supra*. It should confirm that the Due Process Clause sets limits on the receipt into evidence of unreliable out of court statements by an unavailable or non-testifying declarant. The Court should entertain Petitioner's claim that his conviction was obtained in violation of those due process rights because highly prejudicial and unreliable hearsay – his wife's out of court statements – was used against him at his murder trial.

B. Petitioner is Entitled to Habeas Corpus Relief Because His Conviction Rests on Unreliable Hearsay

Though Petitioner, understandably, framed his Constitutional claim by reference to the Confrontation Clause, not the Due Process Clause, that is no bar to relief under 28 U.S.C. § 2254. A Confrontation Clause challenge to a state conviction is *necessarily* a claim that rests on the Due Process Clause of the Fourteenth Amendment, since it is through the Due Process Clause that the protections of the Sixth Amendment have been incorporated and held applicable against the states. *Pointer v. Texas*, 380 U.S. 400, 406 (1965). *See* generally Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 St. Louis U. L. J. 303 (Spring 2001).[4]

[4] The earlier Confrontation Clause case law should, therefore, in the post-*Crawford* world, be recast as due process cases ..."

The state court had a full and fair opportunity to adjudicate Bierenbaum's claim that he was deprived of a fair trial because unreliable and highly prejudicial hearsay was introduced against him. The state appellate court recognized that the constitutionality of Petitioner's conviction turned upon the reliability of his wife's out of court statements. On direct appeal, the state court ruled that Katz's statements bore sufficient indicia of reliability. *See* pp. 8-9 *supra*.

The Second Circuit likewise addressed Petitioner's lack-of-reliability claim under *Ohio v. Roberts*, the Supreme Court law in effect at the time of the state court proceedings.[5] (App. 185-88)

Andrew E. Taslitz, *What Remains of Reliability: Hearsay and Freestanding Due Process After Crawford v. Washington*, 20 Crim Just. 39, 41 (Summer 2005)

[5] The Second Circuit held that this Court has construed § 2254(d)(1) to mandate that federal courts decide habeas corpus petitions with reference to the Court's jurisprudence as of the date of the pertinent state court adjudication on the merits or the date when the state court conviction became final. (App. 186) *See Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., for the Court). But, as far as we have been able to ascertain, the rule has not been applied where, as here, at least with respect to non-testimonial hearsay like the statements at issue here, the Court's jurisprudence law has become *less* protective of the defendant with passage of time.

Petitioner submits that the Second Circuit correctly applied Supreme Court jurisprudence on this subject, but acknowledges that the question is not free from doubt.

Whether or not the challenged evidence was sufficiently reliable that its admission did not violate Petitioner's Constitutional rights is a question that likewise deserves this Court's consideration, in light of the uncertainties created by the abrogation of *Ohio v. Roberts*. Like the highly prejudicial statements at issue in *Shepard v. United States*, 290 U.S. 96, 98 (1933)(reversing murder conviction because the wife's statements were inadmissible hearsay), Katz's hearsay statements were highly prejudicial accusations from the grave.

On their face, the factors to which the state court referred in concluding there were indicia of reliability gave no assurance of reliability. Under the criteria the court listed, any gossip or venting of criticism of a spouse or other individual would be deemed reliable, when common sense and common experience show just the opposite to be true. In this very weak case, introduction of this evidence was obviously prejudicial and led to a verdict that is as unreliable as the evidence adduced by the prosecution to support it.

POINT II

CERTIORARI SHOULD BE GRANTED TO CONSIDER THREE IMPORTANT QUESTIONS CONCERNING THE PROPER MODE OF ANALYSIS FOR THE EVALUATION OF TRIAL PREJUDICE IN FAILURE TO INVESTIGATE CASES

In the years since *Strickland v. Washington*, 466 U.S. 668 (1984), was decided, this Court has considered claims that defense counsel engaged in an inadequate investigation that prejudiced the defendant in connection with the sentencing phase of capital trials, most recently in *Sears v. Upton*, 130 S.Ct. 3259 (2010)(per curiam). *See also Porter v. McCollum*, 130 S.Ct. 447 (2009)(per curiam); *Wong v. Belmontes*, 130 S.Ct. 383 (2009)(per curiam); *Bobby v. Van Hook*, 130 S.Ct. 13 (2009)(per curiam); *Schriro v. Landrigan*, 550 U.S. 465 (2007); *Rompilla v. Beard*, 545 U.S. 374 (2005)(prejudice not contested); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Bell v. Cone*, 535 U.S. 685 (2002). The Court has not given like attention to the issue of deficient pretrial investigation and the prejudice it may generate, where what is at issue is counsel's conduct before and during the guilt phase of a trial.[6]

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[6] In *Harrington v. Richter*, Case No. 09-587, argued on October 12, 2010, this Court may address related issues: counsel's failure, pretrial, to consult experts and/or to present expert testimony at trial, and resulting prejudice.

This case presents three important, interrelated questions relating to the prejudice prong of *Strickland* where defendant's counsel failed to conduct a mandated pre-trial investigation.

First, is the evaluation of prejudice to be made by considering the trial that took place, or the trial that could or would have occurred had a competent investigation been conducted?

Second, should the potential effects of counsel's acts or omissions at trial be evaluated cumulatively, or should the effect of each act or omission be considered separately?

Third, what is the proper role of a post-conviction court in assessing witness credibility and drawing inferences from testimony in the context of an ineffective assistance claim?

Strickland itself sets forth the *general principles* governing prejudice that apply across the board in both capital sentencing and trial contexts.

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence –

> would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

466 U.S. at 695-96. This case presents an appropriate and compelling vehicle for consideration of what this *means* – what mode of analysis applies – where an inadequate pretrial investigation was conducted.

In this case, ignoring *Brady* information that the prosecution placed in their hands, defense counsel performed a patently inadequate investigation that affected the trial in several identifiable ways, including their selection of trial witnesses and framing of the opening statement. Among other things, because of defense counsels' failure to investigate, the jury did not hear an unbiased earwitness testify that she heard the supposedly-already-murdered victim leave the upstairs apartment *alive*.

Yet defendant's ineffective assistance claims were rejected, and his murder conviction stands, even though the evidence of guilt was weak, and serious questions linger about whether he had anything to do with the disappearance of his wife 15 years before his trial.

In the days, weeks, and months following Katz's disappearance, defendant told others, including police investigators, that he and his wife had argued, that she stormed out of the apartment, and that she just did not return. Although exculpatory information was given to defense counsel pursuant to *Brady*, counsel failed to contact or interview a witness who would have supported the defense position that Katz left the couple's high-rise apartment under her own steam. Downstairs neighbor June Sherman had *heard* Katz's noisy exit, and was perfectly willing to testify about it if only defense counsel had contacted her.

This was *critically* important information, given the prosecutor's circumstantial case, the 15-year delay between Katz's disappearance and the trial, Petitioner's defense, and the burden resting on the

prosecution to prove guilt *beyond a reasonable doubt*. This was especially so because defense counsel told the jury that Katz was seen by Joel Davis later that day on the East Side of Manhattan; Davis' sighting was the heart of defense counsel's opening statement.[7] Another witness, Pablo Alvarez, who was *not* called, could have confirmed seeing Katz leave, and, in post-conviction proceedings, defense counsel agreed Alvarez would have been called had Sherman testified.[8]

Defense counsels' failure to speak to June Sherman before choosing their witnesses and framing the opening statement was classic deficient performance. Counsel have a duty under the Sixth Amendment to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary. *Strickland*, 446 U.S. at 691; *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000); *Wiggins v. Smith*, 539 U.S. 510, 523 (2003); *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Where counsel ignores "pertinent avenues of investigation," the decision not to investigate is not a

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[7] "What is disputed by us, so it's clear, is that Gail Katz-Bierenbaum on July 7th, sometime after 11.00 in the morning was alive. She was alive. She was seen by a man named Joel Davis, who you will hear testify. Joel Davis says – after the posters and the television programs looking for Gail Katz-Bierenbaum were put out, Joel Davis called Detective O'Malley–called Missing Persons and said, 'Some time between one o'clock and three p m. on July 7th, that Sunday, I saw Gail Katz-Bierenbaum. I saw her at H&H Bagel on the East side of Manhattan,' and he tells Missing Persons that." (T. 1882)

[8] Defense counsels' position was never controverted, nor their credibility challenged.

reasonable professional judgment. *Porter*, 130 S.Ct. at 453.[9]

Thus, speaking to Sherman before trial would not merely have been "prudent," as the state court suggested. (App. 147) It was Constitutionally required.

A. In Evaluating Prejudice, Does the Court Look at the Trial That Took Place, or the Trial That Would or Could Have Taken Place Had Counsel Acted Competently?

In evaluating defendant's ineffective assistance claim, the state court (and the federal court on habeas) looked at the trial *that occurred*, and not the trial that *could have been*. Thus the court did not consider that, had counsel discharged his duty to the defendant, a different and far more forceful opening statement would have been made. That opening would have alerted the jury to the fact that *three* witnesses – Sherman, Alvarez,[10] and Davis – would

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[9] Where a criminal defense lawyer affirmatively selects a defense theory of the case, stands by that theory throughout the presentation of evidence, and relies on that theory in closing argument, the lawyer's failure to investigate *readily available evidence supporting that theory* is unreasonable. *See, e.g., Wiggins*, 539 U.S. at 526-29, *Clinkscale v. Carter*, 375 F.3d 430, 443 (6th Cir. 2004), *cert. denied*, 543 U.S. 1177 (2005), *Soffar v. Dretke*, 368 F.3d 441, 473 (5th Cir. 2004), *Pavel v. Hollins*, 261 F.3d 210, 219 (2d Cir. 2001); *Hart v. Gomez*, 174 F.3d 1067, 1071 (9th Cir.), *cert. denied*, 528 U.S. 929 (1999); *Chambers v. Armontrout*, 907 F.2d 825, 828-30 (8th Cir. 1990), *cert. denied*, 498 U.S. 950 (1990); *Harris v. Reed*, 894 F.2d 871, 878-79 (7th Cir. 1990).

[10] Because counsel failed to conduct a Constitutionally adequate investigation, the decision not to call Pablo Alvarez could not

confirm defendant's position that his wife had walked out of their home.

As it stood, there was a single witness who supported the defense position, and his credibility was unremittingly attacked.[11] Without question, then, the failure to investigate affected the entire defense presentation, resulting in the presentation of a far weaker defense than could have been mounted. Seen through this lens – looking at the trial that could have been – the existence of prejudice is, Petitioner submits, undeniable.

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properly be treated as a strategic decision, unchallengeable under *Strickland's* deficient performance prong. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U S. at 690 "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 690-91.

[11] In closing, defense counsel recognized this, and argued: "Why call Joel Davis? Because he believed he saw Gail Katz Bierenbaum in the afternoon, and you should hear him and he should be tested by the principle of cross-examination, tested by a very able examiner, Mr Saracco, who is able to take Joel Davis through and in some way make Joel Davis look like a fool ... [But] he knew in '85 that's who he thought he saw, and he's got no axe to grind and no reason to come in here except he believed that's what he saw. It well may be that over time, between '85 and the year 2000, Joel Davis looked at Gail Katz Bierenbaum in his memory and she got bigger and better and different. It doesn't mean that when he saw her in 1985 and saw the poster that he didn't see that. ." (T. 3162-63)

B. In Evaluating Ineffective Assistance, Does the Court Look at Each Act or Omission in Assessing Prejudice, or Must It Look at a Bigger Picture?

The state court, essentially rendering counsel's failure to investigate *irrelevant*, looked separately at defense counsel's acts and omissions *during trial*, each in isolation, without consideration of the whole. It analyzed the case as if counsel's deficiency was merely his failure successfully to serve June Sherman with the trial subpoena.[12] *(See* App. 67-71)

The Court should grant certiorari and consider whether that analytical approach, essentially endorsed by the federal habeas courts, is consonant with *Strickland*. Does piecemeal consideration of counsel's acts or omissions satisfy *Strickland's* mandate that courts consider the "entire evidentiary picture"?

There is a split of Circuit authority on this point. The majority of the Circuits, applying *Strickland*, have held that it is appropriate to look at the cumulative effect of multiple instances of deficient performance by counsel when assessing prejudice.[13]

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[12] The state court looked second, and separately, at defense counsel's decision not to call Pablo Alvarez. (App. 67-73) It considered separately, without reference to the evidence that *was* and was not before the jury, defense counsel's concession in his opening statement that Katz indeed died on July 7. (App 73-75)

[13] Other courts have intimated that such an analysis is proper. *See*, e.g., *Seymour v. Walker*, 224 F.3d 542, 557 (6th Cir 2000)("Because the individual claims of ineffectiveness alleged by [the defendant] are all essentially meritless, [she] cannot show that the cumulative error of her counsel rendered him

See, e.g., Washington v. Smith, 219 F.3d 620, 634-35 (7th Cir. 2000)("Evaluated individually, these errors may or may not have been prejudicial to Washington, but we must assess 'the totality of the omitted evidence' under *Strickland*, rather than the individual errors"); *Harris v. Wood*, 64 F.3d 1432, 1438-39 (9th Cir. 1995); *Gonzales v. McKune*, 247 F.3d 1066, 1078 n.4 (10th Cir. 2001) (*Strickland* ... makes it clear that all acts of inadequate performance may be cumulated in order to conduct the prejudice prong."), *vacated in part on rehearing en banc*, 279 F.3d 922 (10th Cir. 2002); *Lindstadt v. Keane*, 239 F.3d 191 (2d Cir. 2001) (counsel's four errors when viewed cumulatively established ineffectiveness.).[14]

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ineffective"), *cert. denied*, 532 U.S. 989 (2001); *McNeil v. Cuyler*, 782 F 2d 443, 451 (3d Cir.)("Upon reviewing the cumulative effect of these actions and omissions, however, we do not think there is a 'reasonable probability' that without them, the result of the trial would have been different."), *cert. denied*, 479 U.S. 1010 (1986).

[14] Though Second Circuit law allows consideration of cumulative prejudice where multiple acts of deficient performance exist, the Second Circuit did not consider cumulative prejudice here, having ruled that the concession regarding the date of Katz's death (and the failure to call Pablo Alvarez) did not constitute deficient performance at all. (App 193, 197-99) Yet, concessions constitute reasonable trial strategy only where the defendant stands to gain something from the concession that could benefit him in a way that outweighs its cost to him. *See, e.g., United States v. Arnold*, 126 F.3d 82, 89 (2d Cir. 1997); *Anderson v. Calderon*, 232 F.3d 1053, 1089-90 (9th Cir. 2000), *overruled on other grounds, Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir., 2002) *and cert. denied*, 534 U.S. 1036 (2001); *United States v. Swanson*, 943 F.2d 1070, 1075-76 (9th Cir. 1991)("[i]n some cases a trial attorney may find it advantageous to his client's interest to concede certain elements of an offense").

The Fourth and Sixth Circuits take a contrary position. *See Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998)("To the extent this Court has not specifically stated that ineffective assistance of counsel claims, like claims of trial court error, must be reviewed individually, rather than collectively, we do so now."), *cert. denied*, 526 U.S. 1035 (1999); *Girtman v. Lockhart*, 942 F.2d 468, 474-75 (8th Cir. 1991)(rejecting position that, where counsel's errors were individually insufficiently prejudicial to warrant habeas relief, cumulative impact of the errors could establish ineffective assistance of counsel).

C. In Assessing Prejudice, to What Extent May or Must the Court Consider Witness Credibility, and the Weight to Be Given or the Inferences to Be Drawn from the Testimony?

Finally, does a court faced with an ineffective assistance claim assess the credibility of witnesses, the weight of their testimony and the inferences that may be drawn from it. To what extent can the court properly act as a factfinder, and did the state court here overstep those bounds?

The courts' role in evaluating the credibility, the significance, and the impact of testimony of uncalled witnesses has received relatively little judicial attention. The Eighth Circuit has adopted a "hypothetical construct" as the appropriate mode of analysis. *See McCauley-Bey v. Delo*, 97 F.3d 1104, 1105-06 (8th Cir. 1996), *cert. denied*, 520 U.S. 1178 (1997); *Armstrong v. Kemna*, 590 F.3d 592 (8th Cir.), *cert. denied*, 130 S.Ct. 3369 (2010).

The Court "add[s] the testimony of ... uncalled witnesses to the body of evidence actually presented at [the] trial" and considers "(1) the credibility of all witnesses, including the likely impeachment of the uncalled defense witnesses; (2) the interplay of the uncalled witnesses with the actual defense witnesses called; and (3) the strength of the evidence actually presented by the prosecution." *Armstrong*, 590 F.3d at 604-05, *quoting McCauley-Bey*, 97 F.3d at 1106. The test assumes that a court can and should consider the credibility of witnesses, both called and uncalled, and the weight to be given their testimony. The approach also appears to assume that these evaluations are not limited to making a "gate keeping" assessment, that is, determining whether a witness is credible at all.

Strickland nowhere states expressly that courts considering post-conviction ineffective assistance claims should make credibility determinations of any type. On the other hand, assessment of the weight to be given to a witness's testimony may be necessary to do the prejudice analysis *Strickland* mandates, even though that may require taking credibility into account. Yet, a reviewing judge's assessment of credibility and the weight and significance to give testimony is inherently problematic. It is especially so where, as here, the judge deciding the ineffective assistance claim did *not* hold a hearing to hear the uncalled witness testify, and did not hear any of the trial witnesses testify, because she did not preside at the trial.

The extent to which courts may or may not consider the weight to be given an uncalled witness's testimony to determine whether there exists a

reasonable probability of a different outcome presents difficult questions, both theoretical and practical.[15] The state court's implicit resolution of those questions in this case was neither correct nor reasonable, given *Strickland*.

The state court, parsing the testimony it thought Sherman would give based on her affidavit, determined that Sherman was credible, but that parts of her account would arguably have hurt the defendant as much as helped him. However, the Court's recent decision in *Sears v. Upton*, 130 S.Ct. 3259, 3264 (2010), establishes that the fact that bad information is mixed in with the good is unsurprising, and does *not* negate prejudice.

Of equal importance, the state court's parsing effectively placed upon the defendant the precise burden which *Strickland* held a defendant does *not* have to carry. The state court denied relief because defendant failed to convince it that the jury would have *fully* credited what Sherman believed she heard. The state court suggested that factfinders could conclude that Sherman was mistaken about having

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[15] Even the trial courts' gatekeeping role, as, for example, in determining the admissibility of expert testimony, raises difficult questions concerning the respective role of judges and juries. See generally, Edward J. Imwinkelried, *Trial Judges – Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province to Evaluate the Credibility and Weight of the Testimony?* 84 Marq. L. Rev 1 (Fall, 2000) ("It is commonly said that . . . 'questions of fact' are for the jury . The difficulty is that on close scrutiny, the generalization breaks down.").

heard the apartment's *exterior* door close.[16] According to the state court, if the jury believed that there was screaming and the slam of an *interior door, followed by silence*, it would have strengthened the prosecution's theory that defendant killed her.[17] (App. 70-71) That being so, according to the state court, it was "as likely that [the testimony of Sherman] would have hurt the defense as aided it." (App. 70) In other words, the chances of a different result (no conviction)

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[16] The state court stated that, according to the report turned over as *Brady* information, Sherman "only believed that it was the front door that she heard slam and that it could have been any door." (App. 70) However, Sherman's *sworn statement* was that *she believed that the door she heard slam was the apartment's outer door*, which was made of different material (heavy metal) than the interior doors in the apartment. (D.C Dkt. 1, Ex B:E ¶4) That the State might have challenged the accuracy of Sherman's perception, or her ability to perceive a distinction, does not defeat defendant's ineffective assistance claim. *Conclusive* evidence disproving an element of the state's case or conclusively establishing defendant's innocence is not what *Strickland's* "reasonable probability" test requires. *See Sears v. Upton* (compare majority opinion with dissent, which characterizes some of the new evidence as "still[y]"). *Moreover*, even if the prosecution had been able to suggest that Sherman was *wrong* about which door she heard close, the absence of other sounds in the apartment following the door slam *itself* raises an inference, and would have permitted an argument to the jury, that there was no murder or dismemberment going on.

[17] The state court also stated that Sherman's testimony could have hurt the defense because her "account of the click of heels followed by the slam of a door [was] completely inconsistent with defendant's statements that his wife was wearing sandals when she left the apartment." (App. 70) Yet, there simply was *no inconsistency*, for sandals – open-toed shoes – need not be flats. Sandals can have heels of any height. *See, e.g.*, Zappos.com.

and the chances of the same result (conviction) were in equipoise.

The state court's own findings *compelled* relief under *Strickland*. *Strickland* established that defendant's burden is not to show that it is *more likely than not* that he would not have been convicted. 488 U.S. at 693 (a "defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case."). When, as the state court saw it, the balance was 50-50 – as likely as not – the defendant *has established* the reasonable probability *Strickland* requires, and has satisfied the prejudice prong of the *Strickland* test.

CONCLUSION

Petitioner respectfully prays that his petition for a writ of certiorari be granted.

Respectfully submitted,

Nathan Z. Dershowitz
(*Counsel of Record*)
Victoria B. Eiger
Dershowitz, Eiger & Adelson, P.C.
220 Fifth Avenue, Suite 300
New York, NY 10001
212-889-4009

Attorneys for Petitioner
Robert Bierenbaum

Dated: January 14, 2011